CRITICISM RUN AMOK

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Introduction

In chapter 5 of his 1982 book, "Regulation and Its Reform," Judge Stephen Breyer tries to use the National Highway Safety Administration (NHTSA) as an example of regulatory failure in standard setting. As the following shows, NHTSA's standard setting has saved hundreds of thousands of lives and untold billions of dollars for consumers despite strenuous opposition from industry.

Until passage of the National Traffic and Motor Vehicle Safety Act and its companion Highway Safety Act in 1966, Americans did not have Federal regulatory agencies to protect them from death and injury on the nation's highways. In that year, 53,000 people were killed and 1.9 million injured. If the 1966 fatality rate of 5.70 deaths per 100 million vehicle miles traveled had continued,[1] over 165,000 people would have been killed in traffic accidents in 1993. Instead, the death rate was 1.8 and 39,800 were killed. The cost to society of motor vehicle accidents is well over $100 billion.

Failure of the Auto Industry in a Free Market

The first point that Judge Breyer misses is that left to its own in a free market, the auto industry delivered increasing deaths, property damage, air pollution and wasted resources. For the first 75 years of its existence, the motor vehicle industry was unregulated and could have produced safe, efficient and clean cars but chose not to do so. In fact, the auto companies conspired to suppress the development of pollution control technology that would have made cars cleaner and more fuel efficient, knowingly held back such simple, lifesaving technologies as laminated windshields and opposed the funding of mass transit that would have made the nation less reliant on the motor vehicle.

NHTSA Standard Setting

Head Restraints: Judge Breyer singles out NHTSA's Head Restraint Standard (FMVSS 202) as an example of an ineffective regulation. Under Executive Order 12291 issued by President Reagan in February 1981 requiring Federal regulatory agencies to evaluate major rules, NHTSA evaluated the head restraint standard and found that FMVSS 202 prevented 64,000 injuries in rear impacts annually saving $2,150 per injury based on average insurance company compensation for whiplash injuries. Thus the annual saving in injury costs was over $135 million for this standard.

NHTSA found that the number of injuries prevented would have been 85,000 if all car companies had used integral head restraints instead of using adjustable head restraints in two-

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[1]While fatalities climbed steadily from 1900 to 1966, the fatality rate decreased through 1961 to 5.16 when it began to climb again as the auto companies increased horse power and performance. The enormous increase vehicles and miles traveled overwhelmed any decrease in the death rate and produced an annual death toll of 40-50,000 that society found unacceptable.

thirds of their new cars. The choice of adjustable over integral head restraints flies in the face of cost-benefit analysis because the purchase price increase for integral restraints is only $6.65 versus $24.33 for adjustable restraints. Given a performance standard which Judge Breyer favors, the auto makers picked the more costly and less effective technology to meet the standard. If Congress had given NHTSA the authority to mandate a design standard requiring integral restraints, the benefits would have outweighed the costs by 3.4 to 1.

Passive Restraints: In his criticism of NHTSA's issuance of the passive restraint standard, Judge Breyer engaged in sloppy research or deliberate revisionist history. Judge Breyer assumes the ignition interlock (that required seat belts to be fastened before a car could be started) substitute for airbags in 1974 was an idea of NHTSA. In fact, it was an idea of Ford and its lawyer Lloyd Cutler to head off airbags.

The protracted delay in installing airbags in cars was not due to some fatal flaw in standard setting but was rather due to scorched earth opposition of the auto companies who saw airbags giving auto safety regulation a good name. In overturning the Reagan Administration's revocation of the passive restraint rule in 1983, the U.S. Supreme Court called it right in a 9-0 unanimous decision saying, "The auto industry waged the regulatory equivalent of war against the airbag, and lost."

What better justification can there be of auto safety regulation than that it delivered the lifesaving airbag, a technology too good to destroy and developed only because NHTSA used its technology-forcing power to require the auto industry to develop them. Separate studies done by the Insurance Institute for Highway Safety and NHTSA both show airbags reduce occupant deaths by 28 to 29 percent. When all cars and vans are equipped, 9,000 to 12,000 lives a year will be saved and a quarter-million injuries a year will be prevented by this important public health regulation.

Fuel Economy (CAFE) Standards: Judge Breyer makes a passing criticism of NHTSA setting of corporate average fuel economy (CAFE) standards. His criticism is so short because the program is so good. CAFE standards are simply the most successful energy conservation program adopted by the United States. Today, we save nearly 3 million barrels per day of petroleum due to improvements in fuel economy since Congress enacted the Energy Petroleum Conservation Act of 1975 which required NHTSA to adopt CAFE standards. The success of this program has helped reduced gasoline prices and has reduced our dependence on uncertain supplies of oil from the Persian Gulf.

Passenger car fuel economy has more than doubled since then while the vehicle fatality rate has been cut in half in the same time. But for the fact that the Reagan/Bush Administration rolled back CAFE standards for passenger cars and failed to increase CAFE standards for light trucks and vans, we would now be saving over 5 million barrels per day of petroleum. CAFE worked until the Reagan Administration stopped it at the behest of the auto industry.

Bumper Standards: Judge Breyer reluctantly concedes the 5-mph bumper standard worked but attributed it to luck rather than sound analysis. Talk about sour grapes. According to Judge Breyer, this regulation worked because NHTSA guessed right that the industry would use soft face bumpers rather than steel. This was not a matter of guessing but hard work and effective analysis. Anyone who was knowledgeable about the industry realized that soft face bumpers were the bumpers of the future. Ironically, the one regulatory success cited by Judge Breyer was later repealed by the Reagan Administration when it rolled back the 5-mph bumper standard to 2.5-mph in 1982 -- a devolution upheld by Judge Robert Bork.

Tire Ratings: A constant theme of Judge Breyer is that regulatory agencies take too long to issue standards, as was the case with NHTSA when it took nearly 10 years longer than Congress wanted in issuing uniform tire quality grading standards (UTQGS). What Judge Breyer overlooks is that the delay is not due to inefficiencies on part of the agency but frivolous opposition by the regulated industry, including protracted court battles.

The tire industry waged regulatory war against UTQGS just like the auto industry waged regulatory war against the airbag. There were court challenges, Congressional hearings and White House interference just as there was with airbags. Only a citizen suit brought by Public Citizen forced the agency to take action. But this cannot be cited as an example of poor standard setting. If anything, it is heroic overcoming of objections raised by a regulated industry. The proof of the success of UTQGS is that since it has been adopted as a result of citizen litigation, tire treadwear has increased dramatically as the rating system has forced tire companies to compete to produce longer lasting tires.

Large Truck Antilock Brakes: Judge Breyer asserts that NHTSA's technology-forcing regulation for truck brakes "worked very badly ..." because some systems did not work and "the systems changed too rapidly for mechanics to adjust." He says "the agency and industry were wrongly optimistic about how much could be quickly accomplished" and suggests the agency's lack of information makes it difficult to know whether compliance was impossible or the industry did not try hard enough (pp. 106-7).

Technology forcing standards are indeed complex and difficult. But in this case the reasons for the problems with the first brakes produced to meet the standard are well known. First, the standard was not rushed. It was first proposed five years before the effective date, with various amendments along the way to accommodate industry critiques. Second, the major truck brake manufacturing companies were convinced that Gerald Ford, who became president in 1974, a year before the standard took effect, would revoke the standard at their request. As a result, they resisted investing in preparations for manufacture. When the standard was not revoked, they rushed into production at the last moment and made lousy systems.

Other companies, specifically Delco and Wagner Electric, began producing competing systems in 1977 which had none of the problems in the first systems manufactured. The standard was not a failure. Many of the first products were inadequate and some did not even comply because of industry negligence. The agency ordered a number of recalls. But in a weird decision three years after the standard took effect in a trucking industry lawsuit, the 9th Circuit said the agency erred in setting the standard but based its decision on experience with systems manufactured after the standard took effect -- information not known to the agency when it issued the standard.

The concept of electronic rather than mechanical brakes to stop 80,000 pound trucks in shorter distances and keep them in the lane of traffic without jackknifing has been proven successful beyond any doubt. Mechanical brakes are notoriously inadequate for these behemoths. In 1991, Congress, irritated that the agency has not reissued the standard after 13 mostly Reagan/Bush years, mandated a rulemaking on antilock brakes with specific deadlines. With this clear guidance, the agency has acted to reissue the standard.

Naive Criticism

Some of Judge Breyer's criticism of NHTSA is simply naive. He claims that "NHTSA...did not simply consider how it might best save lives" (p. 101). To the contrary, reduction of death and injury are the criteria mandated by the statute and have been used by NHTSA from the very beginning in selecting what standards to issue.

The agency has also made major changes in its rulemaking actions over the years as its information and sophistication advanced but has always been guided by its lifesaving criteria. The first static standards were based on (but not identical to) existing standards. Next came crash test dynamic standards, and then dynamic standards measuring injury levels of dummies instrumented to simulate humans. All of this has been accomplished despite harsh budget cuts at crucial times and a lack of political support in the White House over many years.

In place of head restraints, Judge Breyer suggests "even a very rough cost-benefit analysis" might have led NHTSA to work "on mandating special devices to stop illegal speeding, such as flashing lights on the outside of a car that would indicate a speed of above 60 mph" (p. 101). What Judge Breyer failed to realize is that most whiplash injuries occur in rear impacts in urban areas with speeds of impact under 40 mph. Regardless of the political feasibility of making every car that goes over 60 mph look like a pinball machine, it would do nothing to reduce whiplash injuries because most of the offending cars are going no faster than 40 mph.

In addition, the flashing light concept is highly speculative, can be very dangerous on the highway, and was summarily rejected for further exploration in agency appropriations hearings in 1977.

Judge Breyer also suggests NHTSA should have tried to improve brake maintenance instead of mandating new brake technology (antilock brakes -- he calls them interlock). But the agency has no statutory authority to require improved brake maintenance, and did in fact urge the trucking industry to improve training for its brake mechanics.

Judge Breyer also criticizes NHTSA for relying on voluntary SAE standards for its first set of mandatory standards adopted in 1968. According to Judge Breyer, making the SAE standards mandatory was a mistake because previously auto companies could "reject the standards if they are absurd, inappropriate, or simply wrong." p. 102. What Judge Breyer fails to realize is that the SAE standard-setting process was controlled by an oligopoly of GM, Ford and Chrysler. SAE never set a standard the Big Three didn't want. When Congress passed the 1966 Motor Vehicle Safety Act, it specifically criticized the SAE standards as being inadequate and failing to stem the rising tide of traffic fatalities. NHTSA used only a few elements of SAE standards very selectively in its initial safety standards.

Judge Breyer discusses performance and design standards but does not apparently understand what a performance standard is. For example, he says, "...it may be as easy for the agency to write its standard directly in terms of performance goals, such as cleaner air or fewer injuries. On the other hand, performance standards are often difficult to enforce, because they lead to complex arguments about the appropriate testing procedure for differently designed machines" (p. 105).

A performance standard does not measure the amount of injuries reduced. It contains a test procedure, as for example with Standard 208 for passive restraints that an instrumented dummy cannot suffer significant injuries in a crash test at 30 mph.

Judge Breyer emphasizes many times that "The central problem of the standard-setting process and the most pressing task facing many agencies is gathering the information needed to write a sensible standard" (p. 109).

While he makes interesting and accurate statements about deficiencies in information such as self-interested industry information and industry withholding information to undercut agency action, he suggests no remedies (such as the use of subpoenas or other mandatory devices that NHTSA used for fuel economy rulemaking).

Also, he doesn't indicate any appreciation for the role of agency technical and scientific research which includes real world and proving ground testing, surveys, opinion polls, marketing research, collection of statistical and in-depth data on crashes, injuries and deaths, and on industry production plants, materials and testing, statistical analysis, production of model and experimental vehicles and systems, to mention a few areas. For example, NHTSA spends almost a third of its budget (over $40 million a year) on very sophisticated research in-house and with outside consultants and universities for motor vehicle and highway safety standards.

Judge Breyer appears uninformed about agency research for rulemaking. He describes the agency effort as follows:

"It will obtain the information, in part, through research by agency staff, as they consult research literature and talk to employees of other agencies. Before the agency formulates an initial proposal, the staff may consult widely outside the agency as well. Staff members will telephone, write letters to and arrange meetings with independent experts, industry experts--in fact anyone they consider knowledgeable. Once the Notice of Proposed Rulemaking is promulgated, however, staff members may feel less free to consult widely. ... Obtaining accurate, relevant information constitutes the central problem for the agency engaged in standard setting. It has difficulty finding knowledgeable, trustworthy sources ..." (pp. 102-3).

"Developing information within the agency avoids the taint of industry self-interest, but the agency may lack the requisite technical ability. NHTSA was unable to develop fuel conservation standards, for example" (emphasis added) (p. 111). He indicates NHTSA lacked firm-specific information. He's wrong about the standards and about firm-specific information. NHTSA research evaluated every transmission and engine plant for every U.S. company, what was produced in terms of size and output, how many sold each year etc. In other words, NHTSA knew not just about each company, but about each make/model in preparation for issuance and as well as for evaluation of standards.

Conclusion

Overall, NHTSA regulation of the auto industry has been a dramatic success with over 200,000 lives saved to date, over 2 million injuries prevented, billions of dollars of accident loss avoided, and over 100 million gallons of gasoline saved every day. To the extent there are inefficiencies in NHTSA's actions, it is because of loopholes in the law exploited or created by the auto industry.

Judge Breyer never mentions that most of the problems with truck brakes, passives, tire information and bumpers flowed from the lack of leadership in the Nixon/Ford years when the president disliked or at best was ambivalent about regulation while the industries (tire, truck, auto, bumper) were all tigers against these standards. Who can forget the Henry Ford/Iacocca meeting with President Nixon memorialized on the Watergate tapes where the captains of industry asked the President to revoke the air bag rule and he did?

Of the six NHTSA safety standards he uses to show the failures of the current regulatory/adversary system, four (passive restraints, tire information, bumper damageability, and fuel economy) were completed during the Carter Administration with no difficulty under the administrative procedures he claims are problems. And all of them were difficult, technology-forcing standards vehemently opposed by the relevant industries.

He also never mentions the budget and top staff cuts the agency has suffered, particularly in the Reagan years, which to this day have hamstrung NHTSA in development of much needed technical information. It is amazing the agency got as much done as it did.

NHTSA regulation could be even more successful than it is if there were (1) citizen suits or rights of action to enforce mandates under the Safety Act, (2) broader standing to challenge agency inaction, (3) criminal penalties for violation of the Safety Act, (4) NHTSA authority to issue design as well as performance standards, (5) restored NHTSA funding cut by Congress under pressure from industry lobbyists, and (6) restoration of the antitrust injunction against joint industry lobbying and research on safety, emissions and fuel economy.

The main thesis of Chapter 5 "Standard Setting," focusing primarily on NHTSA, is that regulation under the procedural protections of the Administrative Procedure Act has many pitfalls and with its reliance on an adversary process, it generally does not work well. The better alternative, says Judge Breyer, is negotiation among various interested parties--the industry, academics, consumers and the agency.

For example, he says, "The procedural requirements of 'notice and comment'

rulemaking encourage the agency to use a back-and-forth adversary trial-and-error approach to obtain information and develop standards" (emphasis added) (p. 116).

Difficulties with compliance are a reason "to seek negotiated standards that all parties feel are reasonable, so that firms will not resist compliance" (p. 114).

"Fairness in terms of an ability to hear and to meet arguments can be combined with effectiveness only if all interested parties can meet informally and make various suggestions until agreement is reached or all considerations are out in the open. But this discussion cannot take place through back-and-forth, notice/comment/revise procedures" (p. 117).

"This back-and-forth process may prevent the agency from revising the standard optimally in light of the last set of comments for fear of provoking new hearings. The agency may determine the standard's content initially through informal meetings and negotiation with those affected, later 'ratifying' the decision with a more formal procedure. The courts may hold this process unlawful, however, as an effort to circumvent the law's procedural requirements" (p. 117, fn. 44).

"One sees, for example, obvious major advantages for the agency in achieving mutually satisfactory ('negotiated') solutions, given the agency's comparative inability to secure necessary information--particularly as to costs and competitive impacts, the desirability of securing voluntary compliance procedures and industry cooperation in developing enforcement procedures, and the time and effort saved if judicial challenge can be avoided" (p. 118).

"One sees the time needed to develop standards as stemming in part from the difficulties of obtaining appropriate information and the need to force a multifaceted or 'polycentric' problem into an adversary mode" (p. 119).

Judge Breyer concedes that, "None of these problems warrants abandoning the standard-setting process, nor do these difficulties pose insurmountable obstacles. They are simply tendencies -- likely to be present -- that administrators must take into account when planning strategies for developing workable sets of standards" (p. 119).

But his entire chapter denigrates and undercuts the effectiveness of rulemaking for setting standards. Moreover, his points are often off base or lack thorough understanding of the work of NHTSA.